



September 1, 1999

Ms. Katherine Minter Cary
Assistant Attorney General
Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR99-2469

Dear Ms. Cary:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 126968.

The Office of the Attorney General (the "OAG") received a request for certain consumer complaints and related documents. You indicate that responsive complaints will be made available for inspection and copying. You seek to withhold certain information which you contend is excepted from disclosure by section 552.101 of the Government Code in conjunction with section 17.61(f) of the Business and Commerce Code. You also seek to withhold information which you contend is excepted from disclosure by section 552.103(a) of the Government Code. You have supplied representative samples of the subject information to this office for review.¹ We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

information protected by other statutes. Section 17.61 of the Business and Commerce Code controls the release of documents produced in compliance with investigative demands made by the OAG. The statute authorizes the consumer protection division of the OAG to issue a "civil investigative demand" to any person believed by the division to be in possession of "the original copy of any documentary material relevant to the subject matter of an investigation of a possible violation of this subchapter." Bus. & Com. Code §17.61(a). Such a demand requires the person to "produce the documentary material and permit inspection and copying." *Id.* With exceptions that do not apply here, the statute prohibits the release of "documentary material produced pursuant to a demand under this section." Bus. & Com. Code §17.61(f). Hence, documentary materials produced in response to a civil investigative demand are confidential and must be withheld under section 552.101 of the Government Code. You have supplied documents which establish that civil investigative demands related to the responsive information were served. You relate that the materials identified by you as exhibit 5 were produced in response to one such demand. Based on your representations and a review of the documents, we conclude that this information is confidential and may not be disclosed.

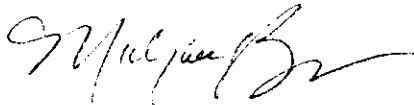
You also contend that "internal OAG memoranda, OAG attorney or investigatory notes, OAG time and expense records, settlement discussions or demands made by this office, attorney work product, documents created by this office pursuant to this investigation and any documents obtained pursuant to this investigation, other than the complaints received," are excepted from disclosure by section 552.103(a) of the Government Code. You have identified representative samples of this information as exhibits 6, 7 and 8.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. To secure the protection of section 552.103(a), a governmental body has the burden of providing relevant facts and documents to show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture; the mere chance of litigation will not establish the litigation exception. Open Records Decision No. 452 at 4 (1986) Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* This office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and where a potential party threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

In this case, you have shown that the information in the subject exhibits relates to litigation that the OAG reasonably anticipates. However, absent special circumstances, where the opposing party to the anticipated litigation has had access to the records at issue, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). If the opposing parties in the anticipated litigation have seen or had access to any of the information in these records, there is no justification for now withholding that information from the requestor pursuant to section 552.103(a). We conclude that the information represented in exhibit 6 may be withheld under section 552.103(a) of the Government Code. The information in exhibits 7 and 8 may not be withheld, as the opposing party has had access to this information. Note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Michael Jay Burns
Assistant Attorney General
Open Records Division

MJB/ch

Ref: ID# 126968

Encl. Submitted documents

cc: Ms. Cheri Escaro
Beasley, Allen, Crow, Methvin, Portis & Miles, P.C.
272 Commerce Street
P.O. Box 4160
Montgomery, Alabama 36103-4160
(w/o enclosures)